No. 16,292

United States Court of Appeals

For the Ninth Circuit

JACK PAUL BROWN,
Appellant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN DOE, d/b/a Kayler-Dahl Fish Company,
Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEES.

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JURISDICTIONAL STATEMENT.

This suit was instituted by libellant-appellant, Jack Paul Brown, on November 29, 1956, (R. 5) to recover damages for personal injuries alleged to have been suffered in an accidental fall on respondents'-appellees' power barge HOMER on September 27, 1954 (R. 3, 4). Appellees excepted to the libel (R. 6). Appellant filed his Amended Libel on April 25, 1957 (R. 9, 13) to which appellees excepted (R. 14, 16). The exceptions were allowed by the Court's opinion (R. 16, 23) on November 6, 1957, which opinion was modified by Order (R. 23-24) dated November 7, 1957,

allowing libellant to amend. Appellant filed his Second Amended Libel (R. 24-30) on December 2, 1957 to which appellees excepted (R. 30-32). The exceptions were sustained by the Court's Opinion (R. 33-35) dated July 8, 1958 and Final Decree (R. 36-37) was entered July 28, 1958. An appeal was taken by appellant on October 24, 1958 (R. 38).

The jurisdiction of the District Court was conferred by the Act of June 6, 1900, c. 786, Sec. 4, 31 Stat. 322, as amended, 48 U.S.C.A. Sec. 101.

The jurisdiction of this Court rests on Secs. 1291 and 1294, Chapter 83, Title 28, *United States Code,* Judiciary and Judicial Procedure, and on The Act of July 7, 1958 (Public Law 85-508, 72 Stat. 348-349. Sections 12-14).

STATEMENT OF THE CASE.

Appellant's Preliminary Statement may be a combination of the statement of pleadings and statement of the case required by this Court's Rule 18, subdivisions 2 (a) and (b). The presentation of appellant's case has made it difficult for appellees to determine the points they are obliged to meet. Hence this statement will include a specification of grounds warranting dismissal of appellant's appeal.

Grounds Warranting Dismissal.

1. Appellant's Points on Appeal (R. 38) merely state that the district court erred in sustaining the exceptions and entering judgment dismissing the libel.

These points present nothing for review. *Woodbury v. Clermont,* 9 Cir., 1956, 236 F.2d 132.

2. Appellant's Brief contains no allegations of jurisdiction as required by Rule 18, subdivision 2 (b) (1), which omission, while it may not be grounds for dismissal, is at least good grounds for reprinting of the brief. *Credit Bureau of San Diego v. Petrasich,* 9 Cir., 1938, 97 F.2d 65.

3. Appellant's Brief contains no statement of the case as required by Rule 18, subdivision 2 (c), unless the Preliminary Statement is so construed. *Thys Company v. Anglo California National Bank,* 9 Cir., 219 F.2d 131.

4. Appellant's Brief contains no specification of errors setting out separately and particularly each error intended to be urged, as required by Rule 18, subdivision 2 (d). *Lowe v. McDonald,* 9 Cir., 1955, 221 F.2d 228; *Anderson v. United States,* 9 Cir., 1955, 218 F.2d 780; *Peck v. Shell Oil Co., Inc.,* 9 Cir., 1944, 142 F.2d 141; *Reynolds v. Lentz,* 9 Cir., 1957, 243 F.2d 589.

Inasmuch as the purposes of the requirements are to conserve the time and energy of the court and to clearly advise the opposite party of the points he is obliged to meet, appellees move and submit that appellant's appeal should be dismissed.

Appellees' Statement.

Appellant's statement is controverted as follows:

All of the purported facts contained in appellant's preliminary statement are either allegations of the

several libels, representations made to the court below during argument on the exceptions, either orally or submitted by brief, or statements presented here for the first time.

That William L. Paul, Jr., appellant's first counsel (R. 28), is an Indian does not appear in the record and the materiality of such fact, if true, is doubtful inasmuch as he was then, and is probably now, duly admitted to practice before the court below and this Court.

That before filing the first suit on September 18, 1956 (R. 19), appellant's proctors did not *learn* from appellant that the HOMER was owned and operated by the corporation, which corporation in fact was not in existence at that time (R. 32), having been dissolved on July 2, 1952 and stricken from the Alaska corporation records September 26, 1952, but were *told* (R. 11) by appellant of the latter's belief in that regard.

That appellees' exceptions to the libels were not only based on the grounds of laches, as asserted by appellant (Brief, p. 3), but also on the additional grounds specified in appellees' exceptions (R. 14-16, 30-32) and which have not been abandoned by appellees.

That in sustaining the exceptions the court below did not hold that the appellees were prejudiced by the delay, as asserted by appellant (Brief, p. 3), because the court below sustained the exceptions on the ground of laches for the reasons stated in the Opinions of the District Court (R. 22-23, 33-35).

Therefore this case is now before this Court, if at all in view of appellant's failure to comply with the rules of this Court in the four respects specified above, on the simple issue of whether or not the facts pleaded in the Amended Libel and Second Amended Libel were sufficient to show excusable delay on the part of the appellant and no prejudice to appellees arising out of that delay.

SUMMARY OF THE ARGUMENT.

1. The District Court did not hold that appellees were prejudiced by appellant's delay in filing the libel.

2. Laches in admiralty is the application of the equitable doctrine that unreasonable delay in bringing suit precludes relief.

3. Laches appearing on the face of a libel may be properly raised by exceptions.

4. The Court may consider exceptive allegations in testing the sufficiency of a libel where laches appears on its face.

5. The burden is upon appellant to allege facts sufficient to overcome the presumption of prejudice where laches appears on the face of the libel.

6. There are no facts before this Court upon which to base an amendment pleading a tolling of the analogous statute of limitations.

7. Appellant is bound by the acts of his proctors.

8. The libels plead no facts which raise equitable excuses for delay, or other exceptional circumstances,

sufficient to raise the bar of the analogous statute of limitations.

ARGUMENT.

Due to the difficulty imposed upon appellees of answering a brief lacking specifications of error, the following argument must necessarily be predicated upon appellees' belief as to what points appellant intended to raise and urge, and is therefore undoubtedly longer than would otherwise have been the case.

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1. THE DISTRICT COURT DID NOT HOLD THAT APPELLEES WERE PREJUDICED BY APPELLANT'S DELAY IN FILING THE LIBEL.

Of the excuses presented for the delay of appellant in instituting the action the court below stated:

> ". . . that the excuses presented for the laches of libelant in failure to bring the action within the two-year period are insufficient reasons in law or equity." (R. 21-22)
>
> "None of the excuses or reasons for delay are sufficient to overcome the presumption of prejudice to respondent." (R. 23)
>
> "None of these reasons present a condition which proper diligence could not have avoided."
>
> "A careful reading of the second amended libel does not disclose to this Court any facts pleaded, which, if proven, would be sufficient to excuse the delay in filing this action, nor does it disclose any new facts which, if proven on the trial, would

overcome the presumption of prejudice which exists as set forth in the former opinion herein." (R. 33)

"None of the matters stated in the second amended libel is sufficient to excuse libelant's failure to file his libel within the period allowed by the statute of limitations, and no facts are pleaded therein which would overcome the presumption of prejudice cloaking the respondents." (R. 35)

Appellant contends that the reasons for delay are immaterial if in fact the appellees were not prejudiced by the delay, and cites *Walker v. Foster,* D.C.E.D. Pa., 1950, 92 F. Supp. 402 as authority. However, the *Walker* case has no application here for it is also authority for the requirement that the libellant must first overcome the presumption of prejudice. And there the libel had been found insufficient and permission to amend was granted. Judge McGranery then found that the amended libel undertook the burden imposed on the libellant and pleaded facts sufficient to warrant trial, in the following language:

". . . it is incumbent upon the libellant to plead and prove facts negativing laches or the tolling of the statute. Detriment to the adverse party is presumed from delay for the statutory period unless the contrary be shown. Libellant has undertaken to show the contrary, by means of the preliminary step of filing an amended complaint containing the necessary allegations, pursuant to the order of the Court."

So in the *Walker* case the district court found that the amended libel met the burden, whereas in the

present case the district court found that the allegations did not do so as a matter of law. The *Walker* case has had judicial notice. Of it Judge Dimock, in *Tesoriero v. A/S Ludwig Mowinckels Rederi,* D.C. S.D. N.Y., 1953, 113 F. Supp. 544, 546, fn 4, stated:

> "As I read *Walker v. Benjamin Foster Co., Inc.,* D.C.E.D. Pa., 92 F. Supp. 402, cited by libellant, it appears that the court was satisfied that sufficient facts were pleaded to negative laches."

Appellant's contention cannot be supported by any case known to appellees.

Appellant has referred to the short delay (R. 5) of some two months in bringing the libel, but has omitted reference to the additional delay of five months in filing the amended libel and of seven additional months in filing the second amended libel.

Appellees therefore submit that appellant's contention and view of the district court's finding are incorrect. The decree dismissing the libel was based on the failure of the libels to allege facts sufficient to constitute a valid and equitable reason for the delay in filing the libel beyond the period of the analogous statute of limitations.

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2. LACHES IN ADMIRALTY IS THE APPLICATION OF THE EQUITABLE DOCTRINE THAT UNREASONABLE DELAY IN BRINGING SUIT PRECLUDES EQUITABLE RELIEF.

Apart from Acts of Congress requiring that particular actions be commenced within a fixed time, there

is no statute of limitations for civil suits in admiralty. In the exercise of their equitable powers the admiralty courts have frequently followed the analogy of the state statute of limitations to determine whether the claim has been barred by inexcusable delay constituting laches. *Benedict, Admiralty,* 6th Ed., Vol. 3, pp. 293, 294.

The rule of laches is applied in admiralty cases by the federal courts of the Ninth Circuit. *The Kermit,* 9 Cir., 76 F.2d 363, 367, certiorari denied *Lamborn v. American Ship & Commerce Nav. Corporation,* 296 U.S. 581, 56 S. Ct. 93, 80 L.Ed. 411.

In determining the question of laches a court of admiralty will be governed by analogy of the state statute of limitations covering actions of the nature disclosed by the libel, in the absence of exceptional circumstances constituting equitable reasons for not barring the action. *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.,* 9 Cir., 73 F.2d 200, 203; *Morales v. Moore-McCormack Lines, Inc.,* 5 Cir., 1953, 208 F. 2d 218; *Claussen v. Mene Grande Oil Company,* D.C. Del., 1958, 163 F. Supp. 779.

In Alaska the statute of limitations governing the time in which actions for personal injuries may be instituted is Section 55-2-7, ACLA 1949, and provides a two year period in which such actions may be commenced.

While the courts are not strictly bound by the analogy they are mindful of the reasons of public policy and equity inherent in the establishment of statutes of

limitations. Judge Kelly had these reasons in mind in writing his first Opinion (R. 22). Inherent in the application of the analogy is the doctrine of equity which gives the court discretion to invoke the bar of laches. Equity frowns on stale claims, and unreasonable delay in bringing suit precludes relief. Reasonable diligence is a prerequisite to invoking the court's aid in the assertion of one's rights. *Whitman v. Walt Disney Productions,* D.C.S.D. Cal., 1957, 148 F. Supp. 37; *Gillons v. Shell Co. of California,* 9 Cir., 1936, 86 F. 2d 600.

Appellant has pleaded his ignorance of the law and in the same breath argues that the information and belief of appellant was good reason for not determining from authoritative sources the status of the respondents from whom appellant seeks some $50,000 in damages. And this reliance was so placed under the circumstances where the deadline was approaching for instituting suit for reasons best known to appellant but which apparently included the motive of attempting to magnify the personal injuries claimed, or possibly, mitigation or lessening of damages through recovery of the appellant.

In any event appellees submit that no equitable reason for the delay was presented, nor any exceptional circumstances which would justify raising the bar of laches, and the court below so held.

3. LACHES APPEARING ON THE FACE OF A LIBEL MAY BE PROPERLY RAISED BY EXCEPTIONS.

Appellant's first point on the nature of the exceptions (Brief, p. 3) appears to state the proposition that the allegations of the libels must stand admitted as pleaded and can only be controverted or attacked upon trial. Carrying this proposition forward to its ultimate conclusion would be equivalent to asserting that a libel cannot be tested preliminarily for sufficiency by exceptions.

It is well settled that where the averments of the libel disclose on its face the fact of the staleness of the demand the objection to the delay may be raised by exception. 175 ALR 369; *U.S. Shipping Board Emergency Corp. v. Rosenberg Bros. & Co.,* 276 U.S. 202, 214, 72 L.Ed. 531; *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.,* supra; *The Sydfold,* 2 Cir., 1936, 86 F.2d 611; *Independent Transp. Co. v. Canton Insur. Office,* 173 F. 564; *Stampalia v. Murphy,* D.C. E.D. Pa., 1929, 34 F.2d 660; *The Vema,* 27 F. Supp. 679; *Marshall v. International Mercantile Marine Co.,* 2 Cir., 1930, 39 F.2d 551.

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4. THE COURT MAY CONSIDER EXCEPTIVE ALLEGATIONS IN TESTING THE SUFFICIENCY OF A LIBEL WHERE LACHES APPEARS ON ITS FACE.

Appellant's argument on the nature of the exceptions (Brief, p. 3), appears to state the proposition that either the court below could not consider or should not have considered, affirmative matter contained in the exceptions for the purpose of contro-

verting the allegations of the libels attempting to negative laches; and, that consequently the allegations of the libel should stand until proved otherwise on trial.

Appellees do not support "trial by affidavits" and concede that preliminary determination of a cause, except upon the merits, is not a favored procedure. Yet there is good reason for the admiralty courts to have the power and discretion to dismiss a libel on a preliminary determination where it appears as in this case, that upon trial none of the facts pleaded if proved would, as a matter of law, excuse the laches appearing on the face of the libel.

And in this regard, as courts of equity, the admiralty courts have been held to have all of the powers of the civil courts.

In the case of *Infante v. Moore-McCormack Lines, Inc.,* D.C.E.D. Pa., 1950, 93 F. Supp. 239, the libel of a passenger against the agent of the owner of a ship was dismissed over the libellant's protests that dismissals in the nature of summary judgments were not permitted by the Admiralty Rules, and only permitted under Admiralty Rule 38 for the reasons therein specified. The Court held that the rules do not limit the power of the Courts in Admiralty for they traditionally have had all of the powers of the civil courts. And on the authority of the *Infante* case the District Court in *Longbottom v. American Dredging Company,* 159 F. Supp. 296, granted partial summary judgment to libellant pursuant to Rule 56 (d), F.R.C.P.

In *Dowling v. Isthmian S.S. Corporation,* 3 Cir., 1950, 184 F.2d 758, Judge Fee indicated the consider-

able latitude inherent in the powers of the admiralty courts in rulings on practice and procedure not involving enlargement or restriction of the court's jurisdiction or the substantive law.

Therefore it appears that appellant's contention would unduly limit the equitable powers of the admiralty courts, and there appears to be ample authority that such is not the case. And to the contrary it appears that the admiralty courts not only have wide powers of equitable discretion but they may use any of the procedures provided for in the Federal Rules of Civil Procedure.

In this respect *Walle v. Dallett,* D.C. N.Y. 1955, 135 F. Supp. 390, is of interest because there, although the exceptions were not sustained, in part because the libellant alleged she had secured her rights under applicable statute by filing a claim with the proper federal bureau, the exceptions were treated by the District Court as in the nature of a motion for summary judgment under Rule 56, F.R.C.P., 28 U.S.C.A.

And similarly, Rule 12 (b) F.R.C.P., 28 U.S.C.A., states in part that if on a motion to dismiss for failure to state a claim upon which relief can be granted, as appellees did (R. 14, 31), matters outside the pleading are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and be disposed of as provided in Rule 56, supra.

In reviewing the facts alleged by the appellant to excuse the delay it is to be remembered that the facts bearing on the issue of laches are wholly within the appellant's knowledge, and that trial of the case would

not, nor could, add to it. Nothing in the knowledge of the opposing party could add to the truth of the matter. Therefore it must be assumed that appellant, in controlling the allegations asserted to negative laches, put his best foot forward. Especially in the present case where the deficiencies of the Amended Libel were pointed out in the first Opinion (R. 23) of the District Court and appellant was given the opportunity to amend, which he did. *Dixon v. American Telephone & Telegraph Co.,* 2 Cir., 1947, 159 F.2d 863.

However, despite the incentive to urge the most compelling reasons to negative laches, appellant has obviously not presented to the court below all that was in his power to present. He did not state *when* his first attorney abandoned his practice and departed from Alaska, nor *when* he consulted his present proctors, nor *when* the first complaint was originally prepared by his first attorney, nor *when* it was delivered to his present proctors, nor did he give the *publication date* of the directory of Alaska corporations which listed the defendant corporation named in the first suit. All of this information which is pertinent to the issue of laches was peculiarly within the knowledge of the appellant.

In view of all of the circumstances appellees deemed that exceptive allegations would be an aid to the court below in determining the sufficiency of the facts alleged to negative laches. The propriety of such submissions where the facts showing the staleness of the claim appears on the face of the libel is well settled. *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.,* supra.

Courts of admiralty, in the exercise of their wide powers of discretion, have resorted to information contained in affidavits even where the libel is sufficient on its face to show that the respondent was neither the ship-owner nor the employer of the injured seaman. *Theriot v. Atlantic Refining Co.,* D.C.E.D. Pa., 1950, 91 F. Supp. 856.

As to the propriety of presenting to the court the fact that a claim is stale, in *The Seminole,* D.C.E.D. N.Y., 1890, 42 F. 924, 925, the court said:

> "But the case is now before the court upon exceptions, and the facts above referred to as judicially known to the court do not appear in the libel. I do not see, therefore, how, upon the exceptions alone, as they stand, the libel can be dismissed. I am, however, of the opinion that a claimant may, in an exceptive allegation attached to exceptions, bring before the court facts judicially known to the court."

Proper use of exceptive allegations is limited to matters of fact of which the court may take judicial notice. 2 CJS 250, Admiralty, Sec. 124 (1); *The Volsinio,* 32 F.2d 357; *North American Smelting Co. v. Moller S.S. Co.,* D.C. Pa., 1950, 95 F. Supp. 71; *U. S. Shipping Board Emergency Fleet Corp. v. Rosenberg Bros. & Co.,* supra.

Exceptive allegations have long been sanctioned for use in the admiralty courts, although there is no basis for them in either statute or rule. The necessity of reasonable use of such allegations and their limitation to matters of which the court may take judicial

knowledge is described in *Suspine v. Compania Transatlantic,* D.C. N.Y., 1940, 37 F. Supp. 263.

The affirmative material, objected to by appellant but not disputed or denied, consists of allegations of the contents of public records of the federal and territorial governments of which the court below could take judicial notice. 31 CJS 517, Evidence, Sec. 12, fn 10, 11. Such records pertain to the question of whether or not appellant was diligent in pursuing his remedy. However, this justification of the well established principle of admiralty law that exceptive allegations may bring to the court matters of which it may take judicial notice, and in the discretion of the court other matters as well, may be entirely immaterial in view of the fact that there is no indication whatsoever that the court below considered this affirmative matter at all in reaching its decision that the allegations contained in the libels were not sufficient as a matter of law to excuse the delay and permit the tardy action.

And it finally appears that such attempts to limit the powers of discretion of the court below have been previously described in the *Infante* case, supra, as follows:

> "Merely to state the proposition that the court is without power to preliminarily determine that question and upon finding against the libellant to dismiss the libel is to manifest its absurdity. It would be pure sham to allow the matter to proceed to trial and then after trial to accomplish the same result as has already been accomplished by the Order of Dismissal."

5. **THE BURDEN IS UPON APPELLANT TO ALLEGE FACTS SUFFICIENT TO OVERCOME THE PRESUMPTION OF PREJUDICE WHERE LACHES APPEARS ON THE FACE OF THE LIBEL.**

Appellant seems to contend that even if the facts pleaded to excuse the delay are found insufficient the appellant may rely upon his allegations of the Amended Libel (R. 12-13) and Second Amended Libel (R. 29) as establishing that there was no prejudice shown against appellees, and that accordingly and as a consequence the exceptions should not have been sustained.

Appellant's view of the law on this point is perhaps more easily understood by examination of appellant's argument (Brief, p. 7) that "if the delay is reasonably explained, *or* it is shown no prejudice has resulted from the delay . . .". Clearly appellant contends that the connection of delay and prejudice in the laches formula is in the alternative. Appellees submit that the connection is in the conjunctive. The formula of laches may be stated as being comprised of delay *and* prejudice.

Thus appellant contends that even if the facts pleaded to negative inexcusable delay are deemed insufficient, then the bare allegation of the legal conclusion of no prejudice to appellees is sufficient to excuse appellees' contention of laches.

Appellees submit that this is not the law and have found no case which disregards the doctrine of presumption of prejudice, which is the basis for all statutes of limitations. To the contrary, it is well settled that when the libel discloses on its face that the

suit was not instituted within the period allowed by the analogous statute of limitations, that the libellant assumes the burden to plead and prove facts negativing laches. *Wilson v. Northwest Marine Iron Works,* 9 Cir., 1954, 212 F.2d 510, 511; *Morales v. Moore-McCormack Lines,* supra; *Redman v. United States,* 2 Cir., 1949, 176 F.2d 713; *The Sydfold,* supra. And it is equally well settled that laches is comprised of two elements, one being inexcusable delay and the other prejudice to the respondent resulting from that delay; and, where there is delay in instituting suit beyond the period allowed by the analogous statute of limitations there is a presumption of prejudice arising from that delay. *Redman v. U. S.,* supra; *The Sydfold,* supra; *McGrath v. Panama R. Co.,* 5 Cir., 298 F. 303; *Kane v. Union of Soviet Socialist Republics,* D.C.E.D. Pa., 1950, 89 F. Supp. 435, 436.

Appellant's contention is untenable for it would dispose of the first requirement of one who would institute a tardy action, namely, *having* and *pleading* an equitable excuse or special circumstances that would overcome the inequity of setting aside the analogous statutory period. If appellant had and pleaded equitable excuse this matter would have proceeded to trial, the presumption of prejudice having been removed for that purpose, and the element of prejudice in the laches formula, along with the element of delay, would have been reserved as a defense to be proved or disapproved on trial. But the fact remains, as appellees submit, that appellant has not pleaded equitable excuse as the court below determined. It is for this reason that the presumption of

prejudice remains as Judge Kelly stated in his Opinion (R. 33).

In the *Kane* case, supra, Judge McGranery discussed the difficulties of a libellant under the presumption of prejudice, and at page 436 stated:

> "It must be conceded that the libellant's position under the presumption, is a difficult one, but the difficulty flows from his own inexcusable delay. If the presumption has the practical effect of emphasizing delay and the deemphasizing prejudice in the laches formula, then it must be taken as the judgment of the court that the facts of the case warrant such a treatment. But, in any event, it cannot be said that the presumption is an unreasonable one."

In the foregoing case, as in *The Sydfold,* supra, and many others, the libellant was permitted to amend. However, in the case before this Court the court below permitted appellant to amend twice.

Appellees submit, as the court below found, that appellant has not met the burden imposed upon him.

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6. THERE ARE NO FACTS BEFORE THIS COURT UPON WHICH TO BASE AN AMENDMENT PLEADING A TOLLING OF THE ANALOGOUS STATUTE OF LIMITATIONS.

Appellant now suggests (Brief, p. 6), that if the decree of dismissal were reversed and the case permitted to go to trial that it would be *possible* and *likely* that appellant could establish that the statute of limitations was actually tolled on account of the absence of *respondent* from Alaska. A similar state-

ment was presented to the court below in appellant's last written brief.

Hence it is clear that appellant's position in this regard was brought to the attention of the court below although not pleaded. Such a situation was reviewed in *Morales v. Moore-McCormack Lines,* supra, where it appeared that libellants did not plead facts negativing laches, but presented them to the court in their brief, and the district judge, giving full consideration to their statements of the facts relied upon by them to excuse the failure to bring the action within the statutory period, correctly concluded that these facts did not excuse the delay.

The question of whether the statute is tolled does not appear to be strictly a part of the formula of laches, although some courts have referred to the necessity of libellant alleging facts sufficient to "negative laches and the tolling of the statute", because admiralty courts are not bound to a mechanical application of the analogous statute of limitations as appellant correctly contends. It would seem that if the statute were tolled that there would be no situation to which the doctrine of laches could be applied.

And although the point was raised in the court below, and in this Court, it also appears that appellant has not presented any facts to either this Court or the court below which would warrant serious consideration of appellant's contention.

Also, appellees submit that the contention has no merit because it is well settled that even in the absence of the persons of the appellees a proceeding in

personam in admiralty could be instituted against appellees by writ of foreign attachment where appellees had property within the jurisdiction. Admiralty Rule 2, 28 U.S.C.A.; *Brown v. C. D. Mallory & Co.,* 3 Cir., 122 F.2d 98; *Claussen v. Mene Grande Oil Co.,* supra; *Puget Sound Tug and Barge Co. v. The Go Getter,* D.C. Oregon, 1952, 106 F. Supp. 492, 493.

Appellant cannot contend or allege that appellees did not have property within Alaska, at all material times since the alleged accident of September 27, 1954, and it is probably significant that in urging an opportunity to prove the tolling of the statute of limitations that appellant does not allege any facts that would support his contention.

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7. APPELLANT IS BOUND BY THE ACTS OF HIS PROCTORS.

Libellant admits (Brief, p. 4) he is bound by the acts of his proctors, yet seemingly argues that it would be inequitable to so permit.

However, that it may have been libellant's proctor and not libellant personally who was responsible for his delay does not excuse libellant's laches. *Redman v. United States,* supra.

In *McGrath v. Panama R. Co.,* supra, the mistake of libellant's counsel in advising that the three year statute was applicable was held not to justify the admiralty court in departing from the applicable one year statute of limitation and the libel was dismissed al-

though filed only 40 days after the running of the statute.

In *Marshall v. International Mercantile Marine Co.,* supra, the Per Curiam decision of Judges Swan, Augustus Hand and Chase read in part:

> "If the appellant had any rights which have been lost through the conduct of her attorneys, we do not think the neglect of attorneys a sufficient reason to justify a departure from the analogy of the statute of limitations where the presumption of detriment has not been overcome."

Appellees have never contended and do not contend here, despite appellant's arguments, any position with respect to the relations between appellant and his proctors.

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8. THE LIBELS PLEAD NO FACTS WHICH RAISE EQUITABLE EXCUSES FOR DELAY, OR OTHER EXCEPTIONAL CIRCUMSTANCES, SUFFICIENT TO RAISE THE BAR OF THE ANALOGOUS STATUTE OF LIMITATIONS.

Appellant seeks to overcome the finding of the court below (R. 33) by the reference to several authorities in support of the proposition that there should not be here a mechanical application of the doctrine of laches.

The Fulton, 54 F.2d 467, 469, is cited seemingly to imply that laches will not bar a claim, and possibly that no explanation of delay need be shown. However brief the opinion in that court may have been, this

case was first reported at 43 F.2d 585, and there the court stated the true reason why the bar of the statute was not raised:

> "There was a plausible excuse for the delay in the protracted negotiations to effect settlement."

In thus speaking of the facts leading up to the institution of the suit, it is apparent that an equitable estoppel was created by the acts of negotiation between the parties which estopped the respondents from raising the bar of the analogous statute of limitations. There is no such situation in the present case.

Walker v. Foster, supra, is seemingly cited to support appellant's claim that the Second Amended Libel in this case overcomes the presumption of prejudice, but as above stated, appellees submit that the real reason for refusing to dismiss the amended libel was because therein libellant had undertaken to assume the burden of alleging facts sufficient to satisfy the court.

And in *Gardner v. Panama R. Co.,* 342 U.S. 29, 30, 72 S. Ct. 12, 13, 96 L.Ed. 31, the Court of Appeals for the Fifth Circuit was reversed for the equitable reason that petitioner had exhibited extraordinary diligence in pursuing her remedy. She brought two actions within one year of the accident, within the one year period allowed by the Canal Zone statute, and the second action was abated by Act of Congress through no fault of petitioner. The third action was instituted within five days after the second one was dismissed. The Supreme Court found in effect a balance of

equities in favor of the petitioner created to a large extent by her diligence, and also the consideration that to hold otherwise would have attributed to Congress the intent that for the year prior to the enactment of the amendment to the Federal Tort Claims Act one of its agencies would have been immune from suits for its negligence. Appellees submit that the *Gardner* case is no precedent for the circumstances presented here.

As to *Pinion v. Mississippi Shipping Co.,* D.C.E.D. La., 1957, 156 F. Supp. 652, cited by appellant, appellees submit that the fact situation found there has no application here. There the libel was filed just seventeen days after the one year statute of limitations had run, and the court found that the delay was completely excusable because the employer had by the payment of workmen's compensation insurance sought to keep the libellant satisfied until the statutory period had run. Another equitable estoppel.

Libellant also relies on *McDaniel v. Gulf & Southern Steamship Co.,* 5 Cir., 1955, 228 F.2d 189, wherein the dismissal of the libel by the District Court was reversed on appeal. There it was held that the averments of the libel as to the injuries which caused permanent damage to libellant's brain and thereby producing defective memory, emotional instability and incapacity to reason coherently, including a total inability to recall or relate any of the facts or circumstances of the injury, justified the finding that the delay of 2½ years was not inexcusable. In the present case it does not appear that appellant was so seriously injured that he could not employ an attorney almost

immediately after the accident, and thereafter his present proctors.

Appellees agree that the rule stated in *C. H. Sprague & Son Co. v. Howard,* D.C. N.J., 1946, 68 F. Supp. 348, is correct, but submit that it has no application here where the libel shows laches on its face, and therefore laches as a matter of law in the absence of a sufficient showing of facts negativing laches.

Appellees also agree with the principles cited by appellant under *National Oil Transport v. United States,* 18 F.2d 305, but submit that the case favors appellees, for upon considering the testimony of the corporate libellant's secretary the Court, acting under equitable principles and administering the highest form of equity, dismissed the libel at libellant's cost.

Hence in all of the cases cited by appellant it appears that there were some equitable reasons for not applying the bar of laches. In *The Fulton* there were protracted negotiations for settlement. In *McDaniel* there was a mental condition caused by the accident sufficient to toll the limitations. In *Gardner* there was the extraordinary diligence exhibited by the libellant. In *Walker* the burden had simply been assumed. In *Pinion* there was an equitable estoppel sufficient to toll the statute.

And on the other hand there are the cases where the following excuses were held not sufficient. Awaiting the result of a similar case in another jurisdiction in *Davis v. Smokeless Fuel Co.,* 2 Cir., 196 F. 753, 755, 756 cert. denied 229 U.S. 617, 33 S. Ct. 777, 57 L.Ed. 1353. Awaiting settlement of litigation in the state

court to commence libel for the whole damage suffered, in *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.,* supra. The tug owners' threat to discharge a tugmaster should he bring suit, from which the tugmaster got the impression he would have steady work, was held to be no excuse in *Delpy v. Crowley Launch & Tugboat,* 9 Cir., 1938, 99 F.2d 36. Four years unexplained delay of the proctor in bringing suit was held to be no excuse in *Wilson v. Northwest Marine Iron Works,* supra.

In summation, it may be fairly said that the question of laches is addressed to the sound discretion of the trial judge, and his decision will not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion. *The Kermit,* supra; *Morales v. Moore-McCormack Lines, Inc.,* supra.

CONCLUSION.

The judgment and decree of the District Court should be affirmed.

Dated, Juneau, Alaska,
May 12, 1959.

Respectfully submitted,

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RALPH E. ROBERTSON,
Proctors for Appellees.